United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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United States Court of Appeals
FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

PLAYGIRL, INC.,

Defendant-Appellee.

INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT AMERICAN BRANDS, INC.

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Preliminary Statement

Appellant American Brands, Inc. (herein American) submits this brief in reply to the Brief and Argument For Defendant-Appellee Playgirl, Inc. (herein Playgirl). American appeals to this Court to reverse the denial of a preliminary injunction.

Restatement of the Questions Presented

"The sole issue presented by this appeal" says Playgirl is "whether the District Court abused its discretion by denying the motion of plaintiff-appellant American . . .

for a preliminary injunction . . .," (p. 1) and American asks, with more particularity:

> (1) when there is irreparable injury due to denial of unique contractual rights, or
>
> (2) when there is irreparable injury due to immeasurable monetary damage,

is it an erroneous abuse of judicial discretion to deny a preliminary injunction upon the record before the District Court?

Restatement of the Case

It is respectfully submitted that there is no material distinction between American's and Playgirl's respective views of the facts of this case and indeed there are no material facts in controversy. However Playgirl's brief relates two alleged facts that should be put in context.

First, Playgirl erroneously states as a fact that American "reserved the absolute unconditioned right to cancel the advertising space covered by the Agreement" (p. 4) and then quotes:

> "We reserve a cancellation privilege as to the use of this space."

Playgirl has deliberately taken this sentence out of context and has failed to quote the entire paragraph of the Agreement on Cancellation which is as follows:

> "We reserve a cancellation privilege as to the use of this space. We have the right to cancel the subsequent issues without penalty if the premiere issue is unsatisfactory to us." (A 21).

Looking at both sentences in context, Playgirl's factual statement is grossly misleading and in fact erroneous.

Second, Playgirl states that American "exercised its right of cancellation" (p. 5) and refers the court to Exhibit D to the Affidavit of its Vice President William J. Miles, Jr. (A 96), a "Change of Insertion Order" for advertising scheduled to have been published in the issue of Playgirl to have been dated May 1973. This is also misleading. As the Court may note from that Exhibit, the change order was not a result of American's exercise of any cancellation right, rather, it was the result of Playgirl's failure to publish any issue dated May 1973. American's advertising agency was merely reflecting on its records that failure of Playgirl to publish and requesting the return of advertising copy.*

I. Playgirl's argument on discretion misses the point:

Playgirl's generalized reiteration of the rule that a preliminary injunction is a matter of "discretion" does not alter the fact that this "discretion" is *judicial discretion* and such discretion must follow the law. As American noted from the case of *Goddard* v. *American Queen,* 44 App. Div. 454 at 459, 61 N.Y.S. 133 at 136 (1st Dept. 1899); reversing 27 Misc. 482, 59 N.Y.S. 46 (N.Y. Sup. 1899). "Under such circumstances, judicial discretion to grant relief becomes judicial duty to grant it." This rule equally binds the conscience of the United States courts. As Chief Justice Marshall has said:

> "Courts are the mere instrument of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to b

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* This failure to publish the May 1973 issue is also the reason for the letter from Mrs. T. B. Fealey which Playgirl refers to (Exhibit 1 [illegible] Defendant's Memorandum, A 55) (p. 7). The attached [illegible] sent by Mrs. Fealey (A 58) reflects a first issue to be dated [illegible] 1973 rather than the May date originally scheduled by Playgirl (A 23).

> exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborn* v. *Bank of the United States,* 9 Wheat. (22 U.S.) 738, 866, 6 L.Ed. 204 (1824), emphasis added.

See more recently, *Littleton* v. *Berbling,* 468 F.2d 389, 412 (7th Cir. 1972).

II. American's arguments on irreparable injury are unrefuted:

Playgirl's reiteration of the erroneous District Court's holding on irreparable injury, *without any other authority,* is the weakest of all arguments and unconvincing at best. Playgirl's bold statement that "American has offered the Court no evidence whatsoever, not contradicted on the record, to support its allegation that the back cover of one magazine is unique" (p. 21) is contradicted by the publicized remarks of both Playgirl and its Vice President, William J. Miles, Jr., set out in Mr. Chester's Affidavit, that "only Playgirl delivers" and that Playgirl Magazine is "An original that stands alone among magazines for women" (A 19).

Further, Playgirl has suggested no basis upon which American might calculate its loss here in monetary terms. Playgirl's citation to the size and gross sales of American Brands, Inc. merely underscores the difficulty in setting a dollar value on the loss caused by Playgirl's breach of contract. As stated by Playgirl:

> "It is highly questionable whether American would, in fact, suffer any damage by its advertising not appearing on the back cover of Playgirl Magazine or any other magazine." (p. 21)

In so stating, Playgirl has agreed with the very argument on immeasurable injury that American made before the District Court and makes now. To uphold the District Court would leave American with a contract which has been violated but without a remedy.

III. American has clearly shown its probability of success on the merits:

The central focus of Playgirl's brief is that American's contract is "void and unenforceable for lacking mutuality of obligation" (p. 12) and thereby concluding that American will not succeed on the merits and that its motion for preliminary injunction was properly denied.

A. There is Both Mutuality and Consideration:

To support its main attack on the validity of the contract Playgirl has cited a line of cases beginning (p. 12) with *Strobe* v. *Netherland Co., Inc.,* 245 App. Div. 573, 283 N.Y.S. 246 (4th Dept. 1935), to demonstrate the proposition that contracts generally require mutuality of obligation or other consideration in order to be binding and Playgirl then illogically leaps to the conclusion that the Agreement of January 26, 1973 is therefore somehow void. Playgirl has neglected to demonstrate though, for indeed it cannot, that the Agreement lacks either consideration or mutuality. In *Strobe* the defendant agreed to supply dairy products and sales equipment but reserved a right to cancel its agreement at any time without ever having incurred an initial obligation, without notice, and without any subsequent obligation.

Unlike in the *Strobe* case, though, American has substantial obligations under the Agreement of January 26 and that case is therefore fundamentally dissimilar. More particularly, unlike the defendant in *Strobe,* American has no right to cancel with impunity, rather American faces

the risk of substantial penalties for any premature cancellation. The Agreement with Playgirl reads:

> "We reserve a cancellation privilege as to the use of this space. We have the right to cancel the subsequent issues *without penalty if the premiere issue is unsatisfactory to us.*" Emphasis added (A 21).

Playgirl, of course, prefers to draw the court's attention only to the first of these two consecutive sentences (pp. 4, 12). It is perfectly apparent though, when the two sentences are read together, that since American's right to cancel is "without penalty if the premiere issue is unsatisfactory," that any cancellation subsequent to the premiere issue would be subject to possible penalty.

In the event that American should cancel its obligation to provide and pay for advertising it would risk two substantial and distinct penalties. The first penalty is the possible forfeiture of prior quantity discounts and bonuses. Should American be allowed for example a ten percent discount due to its agreement to purchase advertising for twelve consecutive months, and then American cancelled its advertising effective after five months' publication, American would incur liability for the ten percent granted for five prior months. In addition American would, upon such cancellation expose itself to the usual damages that any buyer which cancels a contract to purchase goods or services would normally incur. This could be as substantial as the full contract price. *Ware Brothers Co.* v. *Cortland Cart & Carriage Co.*, 192 N.Y. 439, 85 N.E. 666 (1908).

A review of each of the cases cited by Playgirl on this point reveals that each is based on an alleged contract that suffers from the same fundamental dissimilarity. In this case, American has paid a substantial sum under the initial twelve-month obligation and is further obligated to give notice of any cancellation. These two factors make the case not like *Strobe,* which Playgirl cites, but rather like *McCall Co.* v. *Wright,* 198 N.Y. 143, 91 N.E. 516 (1910),

which the court in *Strobe* cited and distinguished. In *McCall* the New York Court of Appeals held that a requirement of thirty days' notice before cancellation, particularly after payment of initial consideration, was not only sufficient to form a binding contract, but also sufficient to support injunctive relief. The *McCall* court said that:

> ". . . a court of equity does not refuse under otherwise proper circumstances to restrain a continuing violation of a valid subsisting obligation not to injure another, simply because that other has the option to cancel the obligation by terminating the agreement which creates it. It seems to me that no element of mutual obligation is involved. One party has furnished a good consideration for which the other has agreed to refrain from doing certain things, and it is no excuse for a violation of the agreement while it lasts that the beneficiary may at some time terminate it. A perfectly familiar illustration of this class of actions is the one brought by a vendor of real estate to restrain a violation by the vendee of a restrictive covenant in the deed. There is at the time no mutual obligation resting on the vendor. But the vendee for a good consideration has agreed not to do certain things and I apprehend it would not be a defense to an action to restrain his violation that the vendor might in the future do something which would terminate the obligation." 198 N.Y. at 153, 154; 91 NE at 519.

Clearly the *McCall* analysis applies to this case, the initial consideration paid by American is substantial and reflected in the record (Chester Aff. ¶ 15, A 16; Miles Aff. Ex. F, A 98-111), and the requirement of notice before any cancellation is included in the provisions of Playgirl's "rate card"* (in which Playgirl unilaterally sets

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* Playgirl's current rate card for example requires notice seven days in advance of its closing date to cancel advertising, sets

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out the terms which govern all of Playgirl's advertising). Playgirl certainly is not suggesting by its allegation that American is not under mutual obligation that Playgirl's advertisers may cancel their commitments without compliance with its rate card and suffer no liability.

As noted, in addition to *Strobe* v. *Netherland Co., Inc., supra,* each of the other cases cited by Playgirl on the questions of mutuality and consideration are factually inapplicable. Further, each was decided without the authority of Section 5-1109 of New York's General Obligations Law; and none of them construed a contract where the plaintiff was obligated, as is American here, to pay a rate established by the defendant for a full year before the right to exercise any renewal option would mature. It hardly seems worth the Court's time to address and distinguish each of these cases separately, but some comment on them may be helpful.

Miami Coca-Cola Bottling Co. v. *Orange Crush Co.,* 296 F. 693 (5th Cir. 1924), merely held that when a party may "at any time" cancel an executory contract with impunity, there is no binding obligation. *Rafolovitz* v. *American Tobacco Co.,* 73 Hun. 87, 25 N.Y.S. 1036 (1st Dept. 1893), adds nothing to the Miami holding but it does, as did *Strobe,* cite and distinguish a case decided by the New York Court of Appeals where it was held that a contract is binding when there is a requirement of notice before a privilege of cancellation could be exercised. See *Wells* v.

(Continued from Preceding Page)

Playgirl's closing date as the 15th of the third month preceding the date of issue, and sets out that it is to be on sale on the "10th of the month preceding date of issue." Accordingly, notice of cancellation must be given more than two months in advance of the date that an issue in question would be scheduled to go on sale. (See, *e.g.,* Miles Aff. ¶ 25, A 88.) Playgirl's rate card is published in a trade journal, SRDS, March 27, 1974, p. 369 (published by Standard Rate & Data Services, Inc.) and the Court may certainly take notice of it.

Alexandre, 130 N.Y. 642, 29 N.E. 142 (1891). *Gross* v. *Stampler,* 165 N.Y.S. 214 (1st Dept. 1917), is not only distinguishable factually, as are each of Playgirl's other cases, but Gross is useful to show how Section 5-1109 of the General Obligations Law has changed the law of New York. In *Gross,* the court said:

> "The transaction between the parties was analogous to an option given without consideration, and it could be rescinded at any time." 165 N.Y.S. at 215.

The law of New York no longer permits promisors to rescind written options with impunity and *Gross* has simply been superseded.

The only recent case cited by Playgirl, *Souveran Fabrics Corp.* v. *Virginia Fibre Corporation,* 37 A.D.2d 925, 325 N.Y.S. 2d 973 (1st Dept. 1971), is an example of a case where a plaintiff sought to enforce a continuing executory right without any current or future obligation, which is entirely unlike this case where American must buy a full year's advertising as a condition precedent to each additional year's option to renew.

A further example of the inapplicable case law cited by Playgirl, *Railroad Service & Advertising Co.* v. *Lazell Perfumer,* 200 App. Div. 536, 192 N.Y.S. 686 (2d Dept. 1922), also represents neither the facts nor law of this case. In *Lazell,* a carrier of advertising was seeking money damages from an advertiser for failure to continue to advertise. The court reviewed the alleged contract and noted that the plaintiff expressly had no obligation to accept or publish any advertising and, therefore, there was no contract. But, as already demonstrated, American is not free to cancel with immunity and further, before its annual renewal option becomes available, American must have paid Playgirl's price for the back cover for all twelve issues of the magazine, then and only then, would American be permitted to exercise its option, an option which would require Ameri-

can to accept another full year's obligation to purchase the Playgirl back cover. Not only must American pay for one year and promise to pay for a second year before it has any right to renew, but the price of that renewal is subject to Playgirl's control. Certainly the parties here have reached a substantial mutual agreement.

B. Playgirl is Bound by the Agreement:

Playgirl has invented an argument that the Agreement does not bind them simply because it is an "understanding" (pp. 15-16). The law is clear that the intent of a writing, expressed therein, is binding. *Rodolitz* v. *Neptune Paper Prods., Inc.*, 22 N.Y. 2d 383 at 387, 239 N.E. 2d 628, 292 N.Y.S. 2d 878 (1968).

C. The Agreement is an Irrevocable Written Option:

The Agreement is not only a binding valid Agreement supported by consideration, but "absence of consideration" is no defense in any event. McKinney's General Obligations Law § 5-1109.

Playgirl's attempt to apply Section 5-1103 of the General Obligations Law to the Agreement in question makes no sense (p. 20). Section 5-1103 relates to modifications or discharges of prior existing contracts. The paragraph of the Agreement in question here was typed on the original document before it was executed, immediately above the signature of Playgirl's agent, Carl Vann, and is unquestionably a major part of the original Agreement. The authority of Section 5-1109, alone, can support American's claim in this action.

D. American's Showing Is Clearly Adequate In This Case:

The thrust of Playgirl's argument has been, then, its misconception that the contract with American is void, and although American has certainly established that the contract is valid and binding, the Court should note that even if it were to find some ground to litigate the validity of the

Agreement,* that would not suffice to deny American a preliminary injunction. As this Court said in *Unicon Management Corp.* v. *Koppers Company,* 366 F.2d 199, 204 (2d Cir. 1966):

> "Appellant also contends that there was no showing by Koppers, nor an express finding by the district court, that Koppers would ultimately prevail on the merits. Such a finding is not required."

This Court has established this rule in an important line of cases holding that "where the balance of hardship tips decidedly towards the party requesting temporary relief," the burden of showing probable success on the merits is lessened. *Dino De Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.,* 366 F.2d 373, 375 (2d Cir. 1966). See also *Gulf & Western Industries, Inc.* v. *Great A. & P. Tea Co., Inc.,* 476 F.2d 687, 692 (2d Cir. 1973); *Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319, 323 (2d Cir. 1969); *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953). The *Dino De Laurentiis* case is a good example of when the "balance of hardship tips." In that case the court found, on the matter of possible money damages compensating the movant that:

> "Certainly, this sum is not as readily calculable as lost royalties and *issuance of a preliminary injunction may be called for when damages are difficult to compute.* Such difficulty is especially common when damage to reputation, credibility or good will is present". 366 F. 2d at 375, 376, emphasis added.

The loss of the opportunity to advertise in a unique advertising space as is in question here is "certainly" not "readily calculable" and will injure most directly American's commercial good will. In *Dino De Laurentiis* the movant would have lost the opportunity to have its new

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* As the District Court said "it presents fair grounds for litigation. That is close to the probability of success" (A 131).

type of motion picture equipment gain recognition through its utilization under a contract and the respondent would have suffered only a money expense: and in this case American may also lose an opportunity to have its products (new or established) gain recognition while Playgirl apparently suffers no loss at all, for American shall pay the established rate that Playgirl may charge.

IV. CONCLUSION

The only possible question as to whether the Agreement is a binding mutual contract, is whether Playgirl will be held to be under any obligation. Notwithstanding American's payments to date and American's obligations to pay for future space, and notwithstanding the risk that American undertook by investing in a new venture, and notwithstanding American's obligation to give notice and its risk of penalties for cancellation, the District Court's holding on this motion for a preliminary injunction leaves the very real possibility that Playgirl, or any other magazine, will be free to breach its contracts to publish advertising with immunity from liability. Therefore in light of the unrefuted showing of irreparable injury, the District Court's abuse of judicial discretion is established.

Accordingly, this court is respectfully urged to reverse the District Court and to grant the preliminary injunction sought by American.

Respectfully submitted,

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Addendum.

McKinney's General Obligations Law §§ 5-1103 and 5-1109:

§ 5-1103. Written agreement for modification or discharge

An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

§ 5-1109. Written irrevocable offer

Except as otherwise provided in section 2-205 of the uniform commercial code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

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UNITED STATES COURT OF APPEALS
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AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

I LAYGIRL, INC.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN, being duly sworn, deposes and says that he is over the age of 18 years. That on the 22nd day of April, 19 74 he served two copies of Reply Brief of Plaintiff-Appellant on Kirschstein, Kirschstein, Ottinger & Frank, Esqs., the attorneys for Defendant-Appellee by delivering to and leaving same with a proper person in charge of their office at 60 East 42nd Street in the Borough of Manhattan, City of New York, between the usual business hours of said day.

Irving Lightman

Sworn to before me this
22nd day of April, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5[illegible]0
Qualified in New York County
Commission Expires March 30, 1976